CHAN KOK CHOON JP

v.

MBF FINANCE BHD

COURT OF APPEAL, KUALA LUMPUR
SHAIK DAUD ISMAIL JCA
SITI NORMA YAAKOB JCA
DENIS ONG JCA
[CIVIL APPEAL NO: C-02-173-96]
25 SEPTEMBER 2000

CIVIL PROCEDURE: *Costs - Taxation - Review by judge - Whether proper to treat review as appeal or rehearing - Whether judge entitled to substitute registrar's decision with his own - Whether registrar committed any error in principle or some other material error - Rules of the High Court 1980, O. 59 r. 36(5)*

Following the discontinuance of the plaintiff's action against him, the defendant was awarded RM14,000 for getting up. The plaintiff's application to the registrar for a review was dismissed, but upon a further application to a judge in chambers the award was reduced to RM2,000. The defendant appealed to the Court of Appeal, arguing that the learned judge had misdirected himself in treating the review before him as an appeal or a rehearing and in substituting the decision of the registrar with his own.

Held:
Per Shaik Daud Ismail JCA

[1] The learned judge made a grievous error when he treated the review as an appeal. He should not have interfered with the decision of the registrar unless there was an error in principle or some other material error. The registrar had applied the correct principles in taxing the defendant's bill of costs and had not committed any such errors.

[Appeal allowed; order of registrar restored.]

*[**Bahasa Malaysia** Tranlation Of Headnotes]*

Berikutan dengan penamatan tindakan plaintif terhadapnya, defendan telah diberi award sebanyak RM14,000 untuk penyediaan guaman. Permohonan plaintif untuk taksiran semula ditolak, akan tetapi pada permohonan selanjutnya ke hakim di dalam kamar, award tersebut telah dikurangkan kepada RM2,000. Defendan merayu ke Mahkamah Rayuan, menghujahkan bahawa yang arif hakim telah khilaf kerana telah menganggap semakan

semula tersebut sebagai satu rayuan atau satu pendengaran semula dan kerana menggantikan keputusan pendaftar dengan keputusannya sendiri.

Diputuskan:
Oleh Shaik Daud Ismail HMR

[1] Yang arif hakim telah membuat satu kesilapan yang besar apabila beliau menganggap semakan semula tersebut sebagai satu rayuan. Beliau seharusnya tidak mengganggu keputusan pendaftar tersebut kecuali jika terdapat kesilapan prinsip atau sebarang kesilapan material yang lain. Pendaftar telah menggunapakai prinsip-prinsip yang betul dalam menetapkan bil kos defendan dan tidak membuat sebarang kesilapan yang sedemikian.

[Rayuan dibenarkan; perintah pendaftar dikembalikan.]

Case(s) referred to:
Diversey (Far East) Pte Ltd v. Chester Chai Chung Ching & Ors [1993] 2 SCR 241 ***(foll)***
JP Finance (M) Bhd v. Tanswan Brothers Enterprise Sdn Bhd & Ors [1994] 3 CLJ 318 ***(dist)***
Lloyds Bank plc v. Ang Cheng Ho Quarry & Ors [1993] 1 MLJ 127 ***(foll)***

Legislation referred to:
Rules of the High Court 1980, O. 14, O. 59 r. 36(5)

Rules of the Supreme Court 1970 [Sing], O. 59 r. 36(5)

For the appellant - Bastian P Vendargon (AM Sebastian with him); M/s Anthony M Sebastian & Co
For the respondent - Francis Tan; M/s Rosni, Francis Tan & Ho

[Appeal from High Court Malaya, Temerloh; Civil Suit No: 23-9-1998]

Reported by Alex KC Lee

JUDGMENT

Shaik Daud Ismail JCA:

This appeal is on the issue of taxation of costs and the principles involved in the review of costs by a judge.

The respondent (the plaintiff in the court below) had sued the appellant (the defendant). The chronology of events shows that the writ was served on the appellant on 29 August 1988. The appellant entered appearance on 3 September 1988. The appellant then filed his statement of defence on 9 November 1988. Then on 30 November 1988, the respondent filed an application for summary judgment under O. 14 of the Rules of the High

Court, 1980. This was followed by an exchange of affidavits. Before the O. 14 application was heard, the respondent flied an application and obtained an order to discontinue the proceeding but nevertheless, costs were awarded to the appellant. It is common ground that although the O. 14 hearing did not take place, the appellant is entitled to a "getting up" fee, but the issue is its quantum. The appellant then taxed his bill of costs before the taxing master *ie* the registrar. The learned registrar allowed a sum of RM14,000 as the getting up fee although the appellant had asked for RM20,000. The appellant was satisfied with the amount allowed but the respondent applied for a review before the taxing master who dismissed the application and confirmed the amount of RM14,000 as the getting up fee. The respondent then applied for a further review before a judge in chambers. The learned judge reduced the amount to RM2,000.

It is the submission of learned counsel for the appellant that the learned judge misdirected himself by treating the review as an appeal and in so doing appraised the review by way of a rehearing and substituted his own discretion with that of the taxing master.

Learned counsel for the appellant cited the decision in *Diversey (Far East) Pte Ltd v. Chester Chai Chung Ching & Ors* [1993] 2 SCR 241. That case is also a case of review of costs. It was submitted that the review by a judge operates as a rehearing and the judge is entitled to exercise his discretion in substitution of the discretion of the registrar in respect of the amounts awarded. The Singapore Court of Appeal in setting aside the Judicial Commissioner's reduction of the taxed costs and restoring the award of the registrar had this to say when interpreting the provisions of O. 59 r. 36(5), of the Singapore Rules of the Supreme Court, 1970:

> The phrase 'as the circumstances require' confers on a judge a discretion. This discretion, however, is not unfettered and must be judicially exercised. The judge should not interfere with the registrar's decision unless there is an error of principle or some other material error. The dicta of Aitken J in *Re Kana Moona Syed Abubakar (deceased)* to to effect that a judge would be justified in interfering where the registrar's decision was an affront to reason and common sense is, in our opinion, too harsh a standard to apply. **What is required is a broad overview of the matter by the judge and if there is an error in principle or some other material error, he will be justified in interfering with the decision below. To suggest, as counsel for the respondents did, that the hearing before the judge is a rehearing would not be in keeping with the wording of r. 36 which speaks of review, not of rehearing nor, for that matter, of appeal.**
> (The emphasis is ours).

Although this is a decision of the Singapore Court of Appeal, it is relevant and justified for us to consider and adopt as O. 59 r. 36 (5) of the Singapore Rules of the Supreme Court 1970 is in *pari materia* with our O. 59 r. 36(5) which covers a review of the registrar's certificate by a judge.

In *Lloyds. Bank plc v. Ang Cheng Ho Quarry & Ors* [1993] 1 MLJ 127, Chong Siew Fai J (as he was then) held that generally speaking the discretion of the taxing officer on quantum will not be interfered with.

In the present appeal we are of the view that the learned judge committed this grave error when he treated the review as an appeal. A perusal of his judgment bears testimony to that. In a number of places in his judgment the learned judge referred to the review before him as an appeal and he ended by holding that he allowed "the appeal with costs". For the learned judge to interfere there must be some error of principles or some other material error. We can find no such errors in this appeal. The learned judge, therefore, should not have disturbed the finding of the registrar. The learned registrar gave his written grounds for reducing the getting up fee to RM14,000 and on going through the grounds we find that he had applied the correct principles in arriving at that figure. The learned judge, however, made no reference at all to these principles. The principles adopted by the registrar are spelt out in Appendix 1 Part X of O. 59 and therefore, there is no need to look elsewhere. We are of the view that the learned judge fell into error when he relied on the decision in *JP Finance (M) Bhd. v. Tanswan Brothers Enterprise Sdn. Bhd. & Ors*. [1994] 1 MLJ 47 in deference to the guidelines provided by O. 59. That decision ought not to be applied because that was a decision based on a successful 0.14 matter; whereas in the present appeal the costs were ordered for the discontinuance of the whole proceeding. He committed yet another error when he treated this matter as a concluded O.14 application. In the light of these errors we allowed the appeal with costs here and below. We set aside the learned judge's decision and restored the order of the registrar. We also ordered the deposit to be refunded to the appellant.